Jewish Wisdom on Choosing Judges

Rabbi Sarah Bassin **17 October 2020/ 29 Tishrei 5781**

וְאַתָּה תֶחֱזֶה מִכָּל־הָעָם אַנְשֵׁי־חַיִל יִרְאֵי אֱלֹהִים אַנְשֵׁי אֱמֶת שֹׂנְאֵי בָצַע וְשַׂמְתָּ עֲלֵהֶ֣ם שָׂרֵי אֲלָפִים֮ שָׂרֵי מֵאוֹת שָׂרֵי חֲמִשִּׁים וְשָׂרֵי עֲשָׂרֹֽת׃

You shall also seek out from among all the people capable men who fear God, trustworthy men who spurn ill-gotten gain. Set these over them as chiefs of thousands, hundreds, fifties, and tens. (Exodus 18:21)

> **Or HaChayim: "**and you shall seek out from amongst all the people able men, etc." This does not mean that the people should appoint the judges, but that Moses should look for suitable candidates. The Torah also hints that inasmuch as Moses would do the appointing, he could view himself as the judge seeing his appointees were his delegates.
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> "from amongst all the people," This means that although Moses might find candidates acceptable to him he should not appoint them until they also proved acceptable to all the people and the people asked for these men to be appointed as judges.
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> **Chizkuni:** CAPABLE MEN -- "men who are mentally able to through the strength of their personalities to endure the people's demand and not be cowed by their threats."
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> MEN WHO FEAR GOD-- and not their fellow human beings
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> **Rashi:** MEN OF TRUTH — These are people commanding confidence (Mekhilta d'Rabbi Yishmael 18:21:1); who are deserving that one should rely upon their words — appoint these as judges because on account of this their words will be listened to.

Sanhedrin 17a

At the time that the Holy One, Blessed be He, said to Moses: "Gather for Me seventy men of the Elders of Israel" (Numbers 11:16), Moses said: How shall I do it? If I select six from each and every tribe, there will be a total of seventy-two, which will be two extra. But if I select five from each and every tribe, there will be a total of sixty, lacking ten. And if I select six from this tribe and five from that tribe, I will bring about envy between the tribes, as those with fewer representatives will resent the others. What did he do? He selected six from every tribe and he brought seventy-two slips. On seventy of them he wrote: Elder, and he left two of them blank. He mixed them and placed them in the box. He then said to the seventy-two chosen candidates: Come and draw your slips. Everyone whose hand drew up a slip that said: Elder, he said to him: Heaven has already sanctified you. And everyone whose hand drew up a blank slip, he said to him: The Omnipresent does not desire you; what can I do for you?

Rabbi Aryeh Klapper
"Judaism Provides Helpful Guidelines for Choosing Judges" Jewish Chronicle, March 31st, 2008

The prospect of an entirely reshaped U.S. Supreme Court makes it important that Americans have a serious conversation about our constitutional system. Jewish tradition can make a significant contribution to that conversation. When Moses creates the first Jewish judiciary, God instructs him to appoint "men of strength, in awe of God, men of truth, haters of corruption" (Exodus 18:21). The first lesson Jewish tradition teaches is that judicial character is more significant than judicial politics.

Today's nominees will likely make their most critical decisions about issues that do not yet appear on the legal horizon. What matters most is not their specific positions but their temperament and understanding of the responsibility of the court. The purpose of a constitution is to place basic principles beyond the reach of the powerful.

The second lesson Jewish tradition teaches consists of a model for the long-term success of a text-ordered society. In Judaism, texts restrain power through authority, and texts gain authority because they have meanings that are discovered rather than produced by their interpreters.

When judicial rulings are perceived as reflecting judges' political opinions rather than painstaking scholarship, they lose their authority. Thus the public perception, justified or not, that Gore v. Bush was decided on the basis of party affiliation cost the Supreme Court tremendously.

The Talmud records similarly that the Great Sanhedrin's capacity to prevent disputes in Israel ended when its members were perceived as ruling on the basis of affiliation with the School of Hillel or the School of Shammai rather than on the basis of individual judgment.

Over much of the latter 20th century, the federal judiciary tended to be more liberal than the electorate. Liberals have accordingly sought to expand the discretion of the courts, especially with regard to constitutional interpretation.

Some of the important advances of the civil rights movement were made possible by these theories. The liberal gains, however, enabled by creative but intellectually unconvincing readings of the Constitution, have made the text less capable of resisting political agendas.

The fear inspired in liberals by the prospect of a conservative Supreme Court brings home the price that has been paid for those theories. If the text of the Constitution were seen as controlling, the political leanings of potential justices would have far less potential effect.

Jewish tradition offers a straightforward if difficult prescription — stick to the traditional meaning of a text except when urgently necessary. The Talmud celebrates legal adaptation, but maintains its received lore with almost fanatic obsession with detail.

When teaching rabbinic students, I gradually bring them to the realization that authoritative interpreters have nearly absolute power over texts, and that real creativity is possible. At the same time, I teach them that this power must be used with extreme caution. If a text can mean anything, it means nothing.

Sometimes one must reread the text and find new wine in old barrels through legitimate legal interpretation.

After the destruction of the Second Temple, the rabbis of the Talmud found creative ways to compensate for the loss of the sacrificial order; and in medieval times, rabbis found creative ways to justify commercial transactions banned by the plain meaning of the Talmud. But this creativity took place against a static traditional background.

Crucially, the rabbis were continuously aware that their capacity to innovate stemmed from their predecessors' resistance to innovation and their own reliance on precedence.

They realized that judicial discretion is not an easily renewable resource, but rather a capital account built up by years of judicial restraint. When they used this resource, they spent it carefully and wisely.

Amy Coney Barrett Supports Health Care Available in Year Constitution Was Written
Andy Borowitz, *The Borowitz Report*, October 12, 2020

WASHINGTON (The Borowitz Report)—Claiming that she has been unfairly branded as anti-health care, Amy Coney Barrett testified that she strongly supports all medical treatments that were available in the year the United States Constitution was written. Like her role model, Antonin Scalia, Barrett said that she considers herself a "strict originalist" and therefore advocates only the health-care practices that the Framers of the Constitution used in 1787.

2002 URJ Resolution on Judicial, Executive Branch and Independent Agency Nominations

Jewish tradition teaches the necessity of fair, just and impartial courts. In Exodus 18:21, for example, Moses' father-in-law, Jethro, advises him to choose capable, trustworthy, and law abiding members of society as judges. Elsewhere we are taught of the ethical obligation to oppose unjust persons and unfair judgments; judges should neither "favor the poor or show deference to the rich." (Leviticus 19:15)

These values are also a cornerstone of American democracy. The preservation of the rule of law rests on the independence and fairness of our courts. Judges at all levels must be committed to defending the Constitution, protecting civil rights and civil liberties, acting within the framework of the precedents set by higher

courts, and enforcing Constitutional legislation enacted by Congress when cases come before them...

Since the landmark ruling in Brown v. Board of Education, advocacy groups on both the right and the left have increasingly come to understand the policy-making role of the courts. While in the past, the pattern was to appoint judges across a fairly wide political spectrum, some recent administrations have intensified efforts to shape the philosophical balance of the courts by appointing as judges individuals who subscribe to a particular view concerning the Constitution and controversial policy issues…

Executive Branch Nominations Although a President is entitled to significantly greater discretion in selecting Executive Branch nominees who reflect the Administration's views and philosophy, some similar considerations apply with respect to confirmation of nominees to these positions. Such appointees serve at the will of the President, and her/his key roles are to provide advice to, and implement decisions of, the President. The President should have wide leeway in appointing people to carry out the President's policies and reflect the Administration's viewpoints. Nonetheless, many of these appointments also shape public policy we care deeply about, and may determine the approach of an entire agency of government. Expressing views on confirmation permits us a role in decisions that determine vital policy matters.

THEREFORE, the Union of American Hebrew Congregations resolves to:

1. Bring to the attention of the Senate of the United States, without opposing or supporting nominees, issues affecting moral policy concerns as articulated in UAHC resolutions on which the nominees' views or record need to be clarified before consent is given. (The process followed by the UAHC in such actions will be the same as that followed in determining the UAHC's position on legislative issues.)

2. Oppose a nominee if after consideration of what the nominee has said and written, and his or her record, it believes that a compelling case can be made that the appointment would threaten protection of the most fundamental rights which our Movement supports (including, but not limited to, the separation of church and state, protection of civil rights and civil liberties, women's reproductive freedom, Israel's security, and protection of the environment). Among the considerations that should be weighed in making this determination are whether:

1. The nominee lacks the competence, professional qualifications, or ethical standards to serve in the position to which he or she is nominated;
2. A nominee for a judicial position has demonstrated a pattern of disregard for generally accepted principles of jurisprudence or a nominee for an executive branch or independent agency appointment has a demonstrated record of opposition to the policies that he or she would be responsible to administer;
3. The nominee has a record of bigoted, racist or anti-Semitic activity;
4. The nominee has emerged as a major and influential ideologue on one or more issues of core concern to the Reform Movement and the appointment would likely contribute significantly to reshaping American jurisprudence or policy in a direction that would jeopardize those core values;
5. The nomination has engendered a national debate on one or more issues of core concern to the Reform Movement so that the outcome of the confirmation or nomination is likely to be perceived as a referendum on that issue and will have significant implications beyond the individual nomination;
6. The nominee's confirmation would shift the ideological or policy balance of a particular court or independent agency on matters of core concern to the Reform Movement.